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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

CRYSTAL MASON,

Appellant,

v.

STATE OF TEXAS,

Appellee.

From the Second Court of Appeals
No. 02-18-00138-CR

Trial Court Cause No. 148710D
From the 432nd District Court of Tarrant County, Texas
The Honorable Ruben Gonzalez, Jr. Presiding

BRIEF OF CRIMINAL LAW SCHOLARS AS *AMICI CURIAE* FOR PETITIONER

Jessica England
(Lead Counsel)
State Bar No. 24105841
jengland@kslaw.com
KING & SPALDING LLP
500 W. 2nd St., Suite 1800
Austin, TX 78701
Tel: (512) 457-2012
Fax: (512) 457-2100

Laura Harris
lharris@kslaw.com
KING & SPALDING LLP
1185 Avenue of the Americas, 34th Floor
New York, NY 10036
Tel: (212) 709-5360
Fax: (212) 556-2222
**pro hac vice application forthcoming*

Paul Alessio Mezzina
David Mattern
pmezzina@kslaw.com
dmattern@kslaw.com
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW, 2nd Floor
Washington, DC 20006
Tel: (202) 626-2946
Fax: (202) 626-3737
**pro hac vice application forthcoming*

ATTORNEYS FOR AMICI CURIAE

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INTEREST OF THE AMICI CURIAE

Amici curiae are scholars of criminal law who have written extensively and taught on principles of criminal law in the United States and in Texas in particular. Their names, titles, and institutional affiliations (for identification purposes only) are listed in Appendix A. *Amici* have a professional interest in the doctrinal, historical, and policy issues involved in this Court's interpretation of the criminal law.

No fees have been or will be paid for the preparation and filing of this amicus brief.

SUMMARY OF ARGUMENT

This appeal poses a question of immense importance: Does a person commit a crime by voting when she *does not know* she is ineligible to vote, but knows facts that make her ineligible? The correct answer should be no. Texas's Legislature specified in Election Code § 64.012(a)(1) that "[a] person commits an offense if the person . . . votes . . . in an election in which the person *knows* the person is not eligible to vote." The statute thus criminalizes conduct only if a person (1) votes in an election and (2) knows that she is not eligible to vote in that election.

In reaching the opposite conclusion, the court of appeals misinterpreted the fundamental principle of *mens rea* and this Court's precedents interpreting that requirement. A bedrock principle of criminal law is that only an individual who acts with criminal intent is subject to criminal punishment. That principle is reflected in the common law, in numerous Supreme Court cases, and in decisions of this Court — which has stood as a bulwark against attempts to read Texas statutes to criminalize apparently innocent conduct. *See, e.g.*, *Delay v. State,* 465 S.W.3d 232 (Tex. Crim. App. 2014).

The decision below, however, turned this principle on its head. Rather than apply the statute as written, the court of appeals held that the State need only prove that a defendant was aware of facts that rendered her ineligible to vote, regardless of whether she knew she was ineligible. *Mason v. State*, 598 S.W.3d 755, 770 (Tex. App.—Fort Worth 2020, pet. filed). That was error. For Crystal Mason, knowing that she "had not yet completed her supervised release," *id.*, was not at all the same as "know[ing] [she] [wa]s not eligible to vote," § 64.012(a)(1). The decision in effect read the written *mens rea* requirement out of the statute, depriving Texas's Legislature of its choice to criminalize voting only when a person "knows [she] is not eligible to vote." As then-Judge Gorsuch observed in a similar case: "How can it be that courts elsewhere read a *mens rea* requirement *into* statutory elements criminalizing otherwise lawful conduct, yet when [the legislature] expressly imposes just such a *mens rea* requirement in [this statute] we turn around and read it *out* of the statute?" *United States v. Games-Perez*, 667 F.3d 1136, 1145 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment).

The requirement that someone act with a culpable state of mind is essential to criminal law in the United States. And it is all the more

important in a case involving voting: "The right to vote is fundamental, as it preserves all other rights." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 12 (Tex. 2011). It is difficult to imagine a decision more likely to chill the exercise of that fundamental right than the decision below, which holds that an individual can be convicted of a crime and sentenced to five years in prison simply for casting a provisional ballot with the honest but mistaken belief that she was eligible to do so.

The decision below should be reversed.

ARGUMENT AND AUTHORITIES

I. *Mens Rea* Is a Fundamental Safeguard Against Punishment for Unknowingly Unlawful Conduct.

The decision of the court of appeals undermines the *mens rea* requirement — a core principle of criminal law. As this Court has explained, the principle "that an injury can amount to a crime only when inflicted by intention is . . . universal and persistent in mature systems of law." *Cook v. State*, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994) (en banc) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)). The presumption that someone must act with *mens rea* to commit a crime is reflected in the common law, in decisions of the U.S. Supreme Court, and in Texas criminal law.

Applying this principle, courts have read statutes with a presumption in favor of "scienter" — a "presumption that criminal statutes require" someone to act with knowledge of "*each* of the statutory elements that criminalize otherwise innocent conduct." *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (emphasis added) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)); *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). This requirement helps to "separate those who understand the wrongful nature of their act from those who do not." *Rehaif*, 139 S. Ct. at 2196 (quoting *X-Citement Video*, 513 U.S. at 72 n.3); *see also* Oliver Wendell Holmes, Jr., The Common Law 3 (1881) ("[E]ven a dog distinguishes between being stumbled over and being kicked."). Thus, courts have read statutes to include a *mens rea* requirement even if the statute was silent or ambiguous — indeed, even if the more natural reading of the statute pointed to no such requirement.

A. *Mens Rea* Is Part of the United States' Common Law Heritage.

Mens rea was a central requirement for a crime under the common law. Both at English common law and in early American decisions, it was universally accepted as a "basic principle" that a "'vicious will'" is necessary for conduct to be criminal. *Rehaif*, 139 S. Ct. at 2196 (quoting

4 William Blackstone, Commentaries on the Laws of England 21 (1769) ("An unwarrantable act without a vicious will is no crime at all.")).

The "vicious will" requirement arrived in England primarily through the church. *See* Albert Levitt, *Origin of the Doctrine of Mens Rea*, 17 Ill. L. Rev. 117, 136 (1923) (concluding that "the genesis of the modern doctrine of *mens rea* is . . . the mutual influences and reactions of Christian theology and Anglo-Saxon law"); *see also* Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 983 (1932) (describing *mens rea* as "a scrap copied in from the teachings of the church"). Central to church teachings was that moral guilt should dictate punishment; a guilty state of mind was essential to moral guilt. English common law thus made *mens rea* "a factor of prime and decisive importance in the determination of criminal responsibility." Sayre, 45 Harv. L. Rev. at 988, 992–93.

By the time of the Founding, English law had universally accepted for centuries "that an evil intent was as necessary for [a] felony as the act itself." *Id.* at 993. *See also* 4 W. Blackstone, Commentaries at 21; Ann Hopkins, Mens Rea *and the Right to Trial by Jury*, 76 Cal. L. Rev. 391, 394 (1988) (describing the "great deal of consensus" about the criminal

intent requirement among the foremost English criminal law scholars of the eighteenth century).

Early American jurisprudence incorporated these same principles. Cases easily adopted the maxim that "[c]rime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette*, 342 U.S. at 251–52. As state legislatures codified common law crimes, state courts inferred the presence of *mens rea* requirements "even if their enactments were silent on the subject." *Cook*, 884 S.W.2d at 487 (quoting *Morissette*, 342 U.S. at 252).

Summing things up, the Supreme Court has explained that a *mens rea* requirement "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)). It has repeatedly emphasized the presumption of scienter and its role in separating wrongful acts from innocent acts. *Rehaif*, 139 S. Ct. at 2196. In that vein, the Court has read scienter requirements into a statute even when (unlike here) the statute's plain language did not include a scienter requirement, and even

when "the most grammatical reading of the statute" suggested there was no such requirement. *X-Citement Video*, 513 U.S. at 72; *see also Staples v. United States*, 511 U.S. 600, 605, 619 (1994) (reading in a scienter requirement when the plain language of the statute was silent concerning the *mens rea* required).

The Supreme Court has also considered statutes, like § 64.012(a)(1), that contain a legal element in the definition of the offense. *See Liparota v. United States*, 471 U.S. 419 (1985). The statute in *Liparota* made it a crime to "knowingly use[], transfer[], acquire[], alter[], or possess[] coupons or authorization cards [*i.e.*, food stamps] in any manner not authorized by [the statute] or the regulations." *Id.* at 420 (quoting 7 U.S.C. § 2024(b)(1) (1982)). The Supreme Court construed the statute to require a defendant to "know" that his use of food stamps was unauthorized by law, reasoning that to do otherwise would "depart[] from th[e] background assumption of our criminal law" that *mens rea* is required. *Id.* at 426.

What is more, the Supreme Court rejected an argument — similar to one the State advances in its brief here — that its construction created an improper "mistake of law" defense. *Id.* at 425 n.9 (internal quotation

marks omitted). As the Court explained, when a statute contains a "legal element" as part of its definition, knowledge is required as to that legal element, even though it is not required as to the existence of the criminal statute itself. *Id.* So to violate a statute criminalizing the receipt of stolen goods, a defendant does not have to know that receiving stolen goods is a crime but does have to know that the goods in question were stolen. *Id.* So too, to violate the statute in *Liparota*, the defendant did not have to know it was a crime to use food stamps in an unauthorized manner but did have to know the use in question was unauthorized by law. *Id.*

So too here. To violate § 64.012(a)(1), Mason did not have to know it was a crime to vote while ineligible, but she did have to know that she *was* ineligible. The fact of Mason's ineligibility, like the fact that the use in *Liparota* was unauthorized, is an embedded "legal element" of the crime as to which *mens rea* is presumptively required. *Liparota*, 471 U.S. at 425 n.9; *see also Rehaif*, 139 S. Ct. at 2198 (where statute made it a crime to "knowingly violate[]" a prohibition on the possession of firearms by those in the United States unlawfully, whether defendant was in the country unlawfully was a "'collateral' question of law" to which the *mens*

rea requirement applied); *United States v. Golitschek*, 808 F.2d 195, 202 (2d Cir. 1986) ("[A] defendant normally need not be shown to know that there is a law that penalizes the offense he is charged with committing. However, he must be proven to have whatever state of mind is required to establish that offense, and sometimes that state of mind includes knowledge of a legal requirement."). The State has no meaningful response to this analysis. The most it can muster (at 26) is to point out that *Liparota* interpreted a federal statute and is not binding on this Court. But *Liparota*'s reasoning is persuasive and has been widely followed. Nor did that reasoning originate with *Liparota*. As the Second Circuit pointed out, the authors of the Model Penal Code made the same point 30 years earlier: "[T]he general principle that ignorance or mistake of law is no excuse . . . has no application when the circumstances made material by the definition of the offense include a legal element." *Golitschek*, 808 F.2d at 202 (quoting Model Penal Code § 2.02 cmt. 11 (Tent. Draft No. 4, 1955)). This Court, too, has *already* relied on *Liparota* to interpret Texas's Election Code, citing it in *DeLay* to make the same point advanced here: that when a statute contains "conduct elements" as part of the definition of a crime, mens rea applies "to those 'conduct

elements' which make the overall conduct criminal," even if some of those elements are legal in nature. *Delay*, 465 S.W.3d at 247 n.54; *see also id.* at 246 n.53, 250 n.62, 251 n.70 (also citing *Liparota*). The State offers no reason to chart a different course here.

B. Texas Courts Have Adopted These Same Principles.

Decisions of this Court have also stressed the importance of *mens rea*. As this Court put it in *Cook*, *mens rea* is "the most basic and fundamental concept of criminal law." *Cook*, 884 S.W.2d at 487. Just like other American courts, this Court has explained *mens rea* as working to distinguish innocent conduct from criminal. Echoing *Morissette*, this Court has recognized that *mens rea* is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.* (quoting *Morissette*, 342 U.S. at 250).

Central to this case, this Court has already adopted the same formulation of embedded legal elements that the Supreme Court adopted in *Liparota*. In *McQueen v. State*, this Court explained that its mens rea analysis varies according to the "'conduct elements' which may be involved in an offense." 781 S.W.2d 600, 603 (Tex. Crim. App. 1989) (en

banc). Some statutes criminalize acts "because of their very nature" — in those cases, "a culpable mental state must apply to committing the act itself." *Id.* On the other hand, some conduct is criminal only if it leads to certain results — in those cases, the statute "requires culpability as to that result." *Id.* Finally, "where otherwise innocent behavior becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances." *Id.* So in a prosecution for unauthorized use of a vehicle, the State had to prove that the defendant knew his use was unauthorized (*i.e.*, that it was without the consent of the owner), because that was the circumstance that "ma[de] the conduct unlawful." *Id.* at 603.

McQueen does not stand alone. To the contrary, this Court has repeatedly emphasized that "when the circumstances of the conduct render the specific conduct unlawful, a culpable mental state must attach to the circumstances of the conduct." *Robinson v. State*, 466 S.W.3d 166, 170–71 (Tex. Crim. App. 2015) (analyzing Tex. Code Crim. Proc. art. 62.102); *see also Lugo–Lugo v. State*, 650 S.W.2d 72, 88 (Tex. Crim. App. 1983) (Clinton, J., concurring) (en banc) (discussing that, when "circumstances surrounding conduct could make an otherwise benign act

dangerous . . . an additional culpable mental state as to that 'conduct element' would be required").

Robinson makes clear that the surrounding circumstances to which the *mens rea* requirement may attach can include a defendant's legal status. The statute there provided that a person commits a crime "if the person is required to register [as a sex offender] and fails to comply with any requirement of this chapter." 466 S.W.3d at 170 (quoting Tex. Code Crim. Proc. art. 62.102). No *mens rea* requirement was specified, so this Court "read one into the statute." *Id.* at 171. It held that, because the circumstance that made the defendant's conduct unlawful was his legal duty to register, the State had to prove that the defendant "knew or was reckless about whether he had a duty to register as a sex offender." *Id.* at 173. It was not enough that the defendant knew or was reckless about *facts giving rise to* a duty to register.

Here, too, the State should have been required to prove that Mason knew that she was ineligible to vote, because that was the circumstance that made her conduct unlawful. In the words of *McQueen*, the statute is the type that makes "otherwise innocent behavior becomes criminal because of the circumstances under which it is done." 781 S.W.2d at 603.

The Legislature chose to make voting — something that is "otherwise innocent behavior" — criminal in circumstances when a person "knows the person is not eligible to vote." Thus, and as the statute specifies, "a culpable mental state is required as to" the fact that the defendant is ineligible to vote. *Id.*

The State faintly contends (at 25) that these cases do not require "that a defendant must actually realize that [the defendant's] actions constitute an offense in order to be convicted." This argument overlooks the distinction between knowledge that the defendant's actions are a crime (which is typically not required) and knowledge of the factual *and legal* circumstances that make those actions a crime (which *is* generally required, even when the statutory language is far more ambiguous than it is here)—a distinction that "is not the less vital because it is subtle." *Golitschek*, 808 F.2d at 203. Here, Ms. Mason's contention is not that she had to know that illegal voting was an offense, but that she had to know the circumstances—namely, that she was ineligible to vote—that transformed the innocuous act of voting into an illegal act.

Moreover, the State ignores that the statutes in these cases were textually ambiguous, unlike the statute at issue here. *McQueen* required

the Court to "decipher[] a statute's language to answer the question of how far down the sentence the stated culpable mental state r[an]." *Robinson*, 466 S.W.3d at 171. And the statute in *Robinson* did not require a culpable mental state at all, requiring the Court to determine on its own "what mental states apply and to what element must they attach." *Id.* at 170. Here, by contrast, the statute provides explicitly that the defendant must "know[] [she] is not eligible to vote." § 64.012(a)(1). That should have made this an easy case.

II. The Decision Below Ignores the Statutory Language and Conflicts with Decisions of This Court on *Mens Rea*.

A. The Texas Legislature Made Plain that to Commit a Crime, a Person Must "Know" She Is Ineligible to Vote.

Section 64.012(a)(1) specifies that "[a] person commits an offense if the person . . . votes . . . in an election in which the person *knows* the person is not eligible to vote" (emphasis added). That statute plainly establishes two prerequisites for criminal liability to attach: (1) a person must vote; and (2) she must "know" she is not eligible to vote.

Rather than apply the knowledge requirement as written, the court below asked only whether Mason knew she was still on supervised release. That reading, however, gave short shrift to the words of the statute. This Court has noted that "[a]ppellate courts must construe a

statute in accordance with the plain meaning of its text unless the language of the statute is ambiguous or the plain meaning would lead to absurd results that the legislature could not have possibly intended." *Chase v. State*, 448 S.W.3d 6, 11 (Tex. Crim. App. 2014). Here, the Legislature plainly included a requirement that a person "knows the person is not eligible to vote."

The Legislature could have written the statute to criminalize other types of conduct, but it did not. It could have omitted the knowledge requirement and written the statute to say "[a] person commits an offense if the person votes . . . in an election in which the person is ineligible to vote." Or, it could have written the statute to say "[a] person commits an offense if the person votes . . . in an election in which the person knows facts that make the person ineligible to vote."

That the Legislature chose not to draft the statute in this manner speaks volumes. *See Cook*, 884 S.W.2d at 489 ("What matters is that the conduct (whatever it may be) is done with the required culpability . . . the Legislature had specified." (quoting *Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985) (en banc))). If the Legislature wanted to write a statute to avoid imposing criminal punishment on individuals who vote

in good faith while mistakenly believing they are eligible, there is no other way to write the statute but as it did in § 64.012(a)(1). How else could the Legislature have made plain that it only intended to criminalize voting by those who *know* they are not eligible to vote than by specifying that the defendant must "know[] [she] is not eligible to vote"?

Respect for legislative intent demands that courts enforce the statutory *mens rea* requirement as written. *Landrian v. State*, 268 S.W.3d 532, 536 (Tex. Crim. App. 2008) ("[I]t is the legislature, not the courts, that defines the forbidden act, the required culpability, and the particular result, if any."). And there is good reason for the Legislature to have written the statute as it did. After all, given the importance of voting to the political process, the Legislature likely did not want to chill lawful voting by threatening criminal punishment for those who vote or attempt to vote in the good-faith belief that they are eligible, only to discover later that they are not.

B. The Decision Below Conflicts with Decisions of This Court.

The decision below cannot be reconciled with this Court's precedent. This Court has repeatedly interpreted state criminal laws that contain a "knowing" requirement to mean what they say. And in the specific

context of election law, this Court held that to commit an offense under a statute that was worded *less* favorably to the accused than the statute at issue here, the accused had to "actually realize[]" their conduct violated the Election Code. *Delay*, 465 S.W.3d at 251–52.

Consistent with the *mens rea* principles discussed in Part I, a long line of cases from this Court has held that "knowing" requires actual subjective intent. *See, e.g.*, *State v. Ross*, 573 S.W.3d 817, 826 (Tex. Crim. App. 2019) (analyzing Tex. Penal Code § 42.01(a)(8)); *McQueen*, 781 S.W.2d at 602–03 (analyzing Tex. Penal Code § 31.07); *Dennis v. State*, 647 S.W.2d 275, 279–80 (Tex. Crim. App. 1983) (en banc) (analyzing Tex. Penal Code § 31.03(a), (b)(2)). When the statute is the type that makes "otherwise innocent behavior" into a crime, the actual subjective intent must be directed to "those surrounding circumstances" that make the behavior a crime — here, Mason's ineligibility to vote. *McQueen*, 781 S.W.2d at 603.

That result follows *a fortiori* from this Court's decision in *Delay*. In that case, a statute made it a crime to "knowingly make a political contribution in violation of" the Election Code. 465 S.W.3d at 242 (quoting Tex. Elec. Code § 253.003(a), (e)). This Court held that to act

"knowingly," the actor had to "be aware, not just of the particular circumstances that render[ed] his otherwise-innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances in fact constitute[d] a 'violation of' the Election Code." *Id.* at 250.

The decision below made no meaningful effort to distinguish *Delay*. It characterized *Delay* as a case about an "ambiguous" statute, but it did not explain why that was helpful to its position. *Mason*, 598 S.W.3d at 769 n.12. The State rotely advances the same argument in its brief here (at 23). Far from helping the State, that "ambiguity" demonstrates that the case for requiring the State to prove knowledge is even stronger here than in *Delay*. There, the statute contained a "patent ambiguity" as to whether the defendant had to know his contributions violated the Election Code. 465 S.W.3d at 251. The court resolved that ambiguity in favor of the defendant, noting that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 251 (quoting *Liparota*, 471 U.S. at 427).

Here, by contrast, there is no ambiguity: The plain language of § 64.012(a)(1) states that a defendant cannot be convicted of illegal voting

unless she "knows [she] is not eligible to vote." If this Court in *Delay* "read a *mens rea* requirement *into*" a statute that contained only an ambiguous knowledge requirement, that is all the more reason not to "read it out of" the statute here, which expressly requires knowledge of ineligibility. *Games-Perez*, 667 F.3d at 1145 (Gorsuch, J., dissenting).

CONCLUSION AND PRAYER

The Court should reverse the decision below.

Respectfully submitted

/s/ Jessica England

Jessica England
(Lead Counsel)
State Bar No. 24105841
King & Spalding, LLP
500 W. 2nd Street, Suite 1800
Austin, Texas 78701
Tel: (512) 457.2000
Fax: (512) 457.2100
jengland@kslaw.com

Laura Harris
lharris@kslaw.com
King & Spalding LLP
1185 Avenue of the Americas,
34th Floor
New York, NY 10036
Tel: (212) 709-5360
Fax: (212) 556-2222
**pro hac vice application forthcoming*

Paul Alessio Mezzina
David Mattern
pmezzina@kslaw.com
dmattern@kslaw.com
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
2nd Floor
Washington, DC 20006
Tel: (202) 626-2946
Fax: (202) 626-3737
**pro hac vice application forthcoming*

CERTIFICATE OF COMPLIANCE

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/s/ Jessica England
Jessica England

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that, on August 2, 2021, a true and correct copy of the foregoing brief was served via electronic filing upon all counsel of record.

/s/ Jessica England
Jessica England

APPENDIX A

The *amici curiae* are listed alphabetically below with their titles and affiliations (for identification purposes only).

Dick DeGuerin
DeGuerin and Dickson
Adjunct Professor
The University of Texas School of Law

David R. Dow
Cullen Professor of Law
University of Houston Law Center

Meredith J. Duncan
Professor of Law
Assistant Dean for Diversity, Inclusion & Metropolitan Programs
University of Houston Law Center

Sharon G. Finegan
Professor of Law
South Texas College of Law Houston

Dannye. R. Holley
Professor of Law
Thurgood Marshall School of Law Texas Southern University

Marcia Johnson
Professor of Law
Thurgood Marshall School of Law Texas Southern University

David Kwok, Ph.D.
George A. Butler Research Professor
Associate Professor
University of Houston Law Center

Jennifer E. Laurin
The Wright C. Morrow Professor
The University of Texas School of Law

Andrea Marsh
Lecturer
Director, Richard and Ginni Mithoff Pro Bono Program
The University of Texas School of Law

Sandra Guerra Thompson
Newell H. Blakely Chair & Criminal Justice Institute Director
University of Houston Law Center

SpearIt, J.D., Ph.D., M.T.S
Professor of Law
Thurgood Marshall School of Law Texas Southern University

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Jeremy Worsham on behalf of Jessica England
Bar No. 24105841
jworsham@kslaw.com
Envelope ID: 55906159
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Associated Case Party: Crystal Mason

Name	BarNumber	Email	TimestampSubmitted	Status
Thomas Buser-Clancy	24078344	tbuser-clancy@aclutx.org	8/2/2021 1:10:07 PM	SENT
Sophia LinLakin		slakin@aclu.org	8/2/2021 1:10:07 PM	SENT
Dale E.Ho		dho@aclu.org	8/2/2021 1:10:07 PM	SENT
Emma Hilbert		emma@texascivilrightsproject.org	8/2/2021 1:10:07 PM	SENT
Hani Mirza		hani@texascivilrightsproject.org	8/2/2021 1:10:07 PM	SENT
Alison Grinter		alisongrinter@gmail.com	8/2/2021 1:10:07 PM	SENT
Kim T.Cole		kcole@kcolelaw.com	8/2/2021 1:10:07 PM	SENT
Andre Segura		asegura@aclutx.org	8/2/2021 1:10:07 PM	SENT
Savannah Kumar	24120098	skumar@aclutx.org	8/2/2021 1:10:07 PM	SENT

Case Contacts

Name
Neal SManne
Robert Rivera
Tom Leatherbury
Robert R.Landicho
Ashley Wiens
Joseph Wilson Spence
Keeley Lombardo
Tanya McGinnis
Rebecca HarrisonStevens
Stacey Soule
Helena Faulkner

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Jeremy Worsham on behalf of Jessica England
Bar No. 24105841
jworsham@kslaw.com
Envelope ID: 55906159
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Case Contacts

Kevin Dubose		kdubose@adjtlaw.com	8/2/2021 1:10:07 PM	SENT
Christine Sun		christine@statesuniteddemocracy.org	8/2/2021 1:10:07 PM	SENT
Kathleen R.Hartnett		khartnett@cooley.com	8/2/2021 1:10:07 PM	SENT
Julie Veroff		jveroff@cooley.com	8/2/2021 1:10:07 PM	SENT
Darina Shtrakhman		dshtrakhman@cooley.com	8/2/2021 1:10:07 PM	SENT